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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

May 7, 1996

EX PARTE

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CS Docket No. 96-46, Open Video Systems (OVS)

Dear Mr. Caton:

A meeting was held today with Maureen O'Connell, Legal Adviser to Commissioner Quello, to discuss the positions taken by the Joint Parties and USTA in the pending OVS rulemaking. The Joint Parties were represented by Jay Bennett-Pactel, Whitney Hatch-GTE, Mike Bennett-SBC, Al Shuldiner-Lincoln Telephone, Karen Possner and Mike Tanner-BellSouth and the undersigned. USTA was represented by Todd Colquitt. The attached handouts document the issues discussed in the meeting.

Please call me if you have any questions concerning this filing.

Sincerely,

Marie Breslin

Attachments

cc: M. O'Connell

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Open Video Systems

Flexible Regulation

OVS rules must promote the Congressional goal of “flexible market entry, enhanced competition, streamlined regulation, diversity of programming choices, investment in infrastructure and technology, and increased consumer choice.”

The Commission’s rules should codify the requirements stated in Section 653 of the 1996 Act and provide OVS operators guidance, in the form of Notes, on how it will interpret and enforce the rules.

Further attempts to “front load” OVS rules could render OVS a non-option for video delivery

Commission should rely on market forces, not detailed regulations, as controls against discrimination and anticompetitive behavior

- regulations, beyond those specified in the Act, will require the Commission to prejudge the market characteristics, network technologies and services
- there is no basis for the Commission to substitute its judgement over the operation of competitive market forces
- the complaint process will enable the FCC to address questions of discrimination that may arise

Rates, Terms, and Conditions

Commission should rely on competitive market forces, as it has in the Competitive Carrier and CMRS proceedings, to regulate rates, terms, and conditions of OVS carriage

OVS operator, as “new market entrant” must be free to negotiate business arrangements that reflect well-established ways of doing business in the MVPD market

Commission must reject its tentative conclusion to require public disclosure of OVS contracts. Public contracts are equivalent to Title II tariffs, and as the Commission found regarding leased access rates, would be “unnecessarily intrusive on business relationships”

Capacity

OVS operator should be permitted to:

- administer the allocation of channel capacity
- select its channels from the total base of channels
- exclude PEG, must carry/retransmission and shared channels from the operator’s 1/3 capacity calculation
- impose 1/3 limit on individual, unaffiliated video programming providers if operator is likewise constrained to 1/3 capacity

Commission should afford OVS operator reasonable period of time, consistent with programmer contracts, to accommodate additional demand when system is operating at full capacity. Accommodation may include building new capacity or re-engineering existing capacity.

Carriage

Primary focus of Commission rules must be on ensuring OVS can be a viable competitor to existing cable operator and Commission must provide OVS operator the option to deny carriage to incumbent cable operators in the OVS service area

OVS operator should be able to impose reasonable requirements on video programming providers to assure requests for capacity are bona fide

Dispute Resolution

Commission should establish specific presumptions and burdens of proof that will apply in the 180 day complaint proceeding

Justness and reasonableness of differences in treatment among video program providers should be based on factors relevant to the MVPD business

PEG/Must Carry/Retransmission Consent

Commission must affirm that operators are not required to negotiate PEG access or related matters with state or local authorities and must not tie operators' duties directly to regulation of individual cable operators

OVS operators are required under Section 611 to make capacity available for PEG access. Commission should permit operators to provide the same level of PEG programming in the most technically efficient manner possible

Commission rules should allow OVS operators to interconnect with existing PEG channel feeds and preclude uneconomic, duplicative requirements

Must Carry/Retransmission Consent and Program Access rules apply to OVS in the same way they apply to cable systems

Commission should require broadcasters to offer consent for retransmission by OVS operators or their affiliates on the same terms and conditions given to cable operators

Cost Allocation

Existing Part 64 Rules have been found to be adequate in numerous FCC decisions and audits, and have been used to accommodate provision of non-common carrier services. OVS can be accommodated in a like manner. No new rules are required.

operated by an MCS provider, generally only available to schools, hospitals, government buildings and similar institutions, which is able to provide both upstream capacity needed by the City and the downstream needs of all served facilities.

- (45) "Late charge" means a charge which is added to a subscriber's account or bill for non-payment of a previously due and delinquent account.
- (46) "Local" means within the geographical boundaries of the City of Irving, Texas.
- (47-54) RESERVED.
- (55) "Mayor" means the Mayor for the City of Irving, Texas.
- (56) "MCS" means multi-channel service.
- (57) "MCS provider" or "Multi-channel service provider" means any person or group of persons who:
 - a) provides multi-channel video, voice and/or data communications programming or service over a multi-channel system and directly or indirectly owns a significant interest in such multi-channel system; or
 - b) otherwise controls or is responsible for, through any arrangement, the management and operation of such a multi-channel system.

The term "MCS provider" or "multi-channel service provider" specifically includes the terms "cable operator", "MCS provider" or "multi-point distribution system provider", "MMDS provider", "open video system operator"~~personal communications network system provider~~ (where applicable), and "SMPTV operator" (where applicable). An MCS provider need not own the transmission facilities over which its multi-channel service is delivered. References in the ordinance to MCS provider shall encompass subsidiary companies and other affiliates with whom the MCS provider has transactions affecting its provisions of multi-channel services.

- (58) "MDS" means multi-point distribution system.

- (59) "MDS provider" or "Multi-point distribution system provider" means any person or group of persons who is authorized by the FCC, within frequency boundaries established by the FCC, to transmit specialized multi-channel programming or data or facsimile transmission to subscriber-selected locations.
- (60) "Multi-channel programming service" or "Multi-channel service" means:
- a) the transmission to subscribers of video programming, or other programming service; and
 - b) subscriber interaction, if any, which is required for the selection of such video programming or other programming service.
- (61) "Multi-channel system" means a facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment designed to provide multi-channel programming service to multiple subscribers in the City of Irving and vicinity.
- ~~b) a facility consisting of infra-red transmission or point-to-point transmission (as permitted by law); or~~
- ~~c) any functional equivalent that is designed to provide multi-channel service which includes video, voice and data programming or service and which is provided to multiple subscribers within the City.~~

However, such term does not include the following:

- (a) a facility that only retransmits the television signals of one (1) or more broadcast stations; or
- (b) a facility that (i) serves only subscribers in and one (1) or more multi-unit dwellings under common ownership, control, or management; and unless such facility or facilities uses any public rights-of-way; (ii) such facility does not use any public rights-of-way; or
- (c) a facility or common carrier which is subject, in whole or in part, to the provision of Title II of

the Communication Act of 1934 except that such facility shall be considered a multi-channel system ~~(other than for purposes of Section 621 (c) of the CCPA codified at 47 USC: 541)~~ to the extent such facility is used in the transmission of multi-channel programming service to subscribers to such service; voice, or data programming or service directly to subscribers; or

(d) any facilities of any electric utility used solely for operating its electric utility.

- (62) "Open video system operator" means a common carrier operating a wire-based video programming distribution system certificated by the Federal Communications Commission pursuant to Section 653(a) of the Communications Act of 1934, 47 U.S.C. § 573(a), as added by Section 302 of the Telecommunications Act of 1996, P.L. 104-104.
- (63) "Other programming service" means information that an MCS provider makes available to all subscribers generally.
- (64) "Open Video System (OVS) means a local exchange carrier may provide cable service to its cable service subscribers in its telephone service area through an open video system that complies with the Act. The conditions under which a LEC may provide OVS will be determined by regulations that the FCC will prescribe consistent with the public interest, convenience, and necessity. Unlike a cable operator, the operations of an OVS must make available two-thirds of its capacity for use by others through reasonable, non-discriminatory tariffs.
- (65-69) RESERVED.
- (70) "Pay-per-view" means single programming offered by an MCS provider for which a subscriber selects and pays a separate fee to view. The programming would not be available to subscribers who do not choose to pay for viewing.
- (71) "Person" means any individual, corporation, business, trust, estate, trust, partnership, association of two (2) or more persons having a joint common interest.

with City representatives, when the~~there~~ that MCS provider makes such technologies available to ten (10) percent or more of its national subscriber base.

SECTION 73: SPECIFIC ADDITIONAL PUBLIC, EDUCATIONAL, AND GOVERNMENTAL RULES FOR MCS PROVIDERS.

- A) The City recognizes that fostering a sense of community is one of the goals of local government and that television plays a key role in the information age of providing individuals with knowledge about their community, their government, their schools and issues of importance locally. The City is committed to communicating local information to the broadest spectrum of the community and in order to implement said goals, the City imposes the requirements of this section.
- B) An MCS provider shall provide at its own expense:
- (1) three (3) channels on the system designated for use by the City for programming produced by Irving Community Television Network;
 - (2) one (1) educational access channel;
 - (3) one (1) public access channel that is available for use by various community groups, individuals and organizations which shall be operated by the MCS provider;
 - (4) a commercial access channel leased from the MCS provider pursuant to federal law; and
 - (5) a separate institutional network shall be provided for interactive transmission between schools, governmental buildings, hospitals, institutions and other selected locations.
- C) The City reserves the right to increase the above minimums either by amendment to this ordinance or through requirements in a franchise or authorization agreement.
- D) Each~~An~~ MCS provider shall at its own expense:

Initial Proposed Ordinance by City of Irving

- (1) Employ reasonable efforts and methods to inform citizens of Irving of the availability of public access;
 - (2) Provide public use of one production studio in the city and the production and editing equipment at that studio reasonably necessary to produce programming of a reasonable quality and technically sufficient to be cable cast, subject to such rules and regulations for use as are reasonably necessary to prevent loss or damage to such studio or equipment. This provision does not require that each MCS provider furnish its own separate studio. An MCS provider may meet the terms of this subsection by furnishing its own local studio, or by joining with another MCS provider to make available a local studio or by joining with a community college or another company to make available a local studio; and
 - (3) Provide such instruction in the use of the studio and production and editing equipment as is reasonably necessary for its proper use.
- E) Costs of fulfilling public, educational and governmental requirements:
- (1) ~~Each~~ An MCS provider shall bear the cost of meeting public, educational and governmental requirements;
 - (2) An MCS provider shall pay a uniform per user charge to the City to support the Irving Community Television Network, to be set out in each franchise, license or permit; and
 - (3) Additional requirements, such as special project grants, may be set forth in individual MCS provider's franchises.
- F) In the event there are multiple MCS providers operating concurrently in the City, the City Manager may require each MCS provider to interconnect all the respective PEG, I-Net, and leased channels, or some of them, with those of one or more other MCS providers to jointly provide some or all of the services, facilities, and funding required under this section. Alternatively or cumulatively, the

City Manager may commute duplicative services
under this section into monetary payments.

SECTION 74: RESERVED.

SECTION 75: "BLOCKING" CHANNELS; MCS PROVIDER CIVIL
LIABILITY.

- A) An MCS provider shall effectively block out any channel upon user request. Effectively blocked means that no audio, video, data or any other signal is received over that channel by the user who requested blocking. An MCS provider shall inform users of their right to block channels at time of installation and at least quarterly thereafter. The notice may be included in a billing statement.
- B) Nothing in this Ordinance shall be deemed to affect the criminal or civil liability of MCS providers pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws.

SECTION 76: EQUIPMENT COMPATIBILITY.

- A) The City recognizes the fact that it is in the public's interest to be able to utilize the functions inherent in subscriber receiving equipment, without having to incur additional costs to obtain the same functions.
- B) At a minimum, an MCS provider shall meet all federal requirements concerning equipment compatibility.
- C) If an MCS provider has equipment which is compatible with the users equipment in other systems, it shall provide Irving users with the same compatibility, unless the MCS provider can demonstrate to the City that it is technically or economically unfeasible or commercially impracticable to provide such equipment to Irving users.

SECTION 77: MISCELLANEOUS PROVISIONS - TAMPERING AND
UNAUTHORIZED RECEPTION OF CERTAIN SERVICES.

- A) No person shall intercept or receive, or assist in intercepting or receiving any communications service offered over a multi-channel system, unless